IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

WEDNESDAY, THE 14TH FEBRUARY 2007 / 25TH MAGHA 1928

MFA.No. 1405 of 2001

OPMV.3134/1996 of MOTOR ACCIDENT CLAIMS TRIBUNAL, ERNAKULAM

APPELLANT: PETITIONER

MAXWELL ROZARIO, AGED 51 YEARS, S/O. MANUEL ROZARIO,
VICTORY COTTAGE, NEAR CHURCH, VALLARPADAM P.O.,
ERNAKULAM - 682 031.

BY ADV. SRI.R.SUDHISH
SMT.MANJU SUDHISH

RESPONDENTS: RESPONDENTS 1 TO 3
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1. O.B. RAYMON, S/O. BASTIAN, ODATHAKKAL HOUSE,
FORT COCHIN, COCHIN-1.

2. BINEESH P.V., S/O. VIJAYAN, PUZHAKKAREDATH VEETTIL,
NEAR GOTHURUTH BRIDGE, MUTHUKUNNAM VILLAGE,
N. PARUR, ERNAKULAM DIST.

3. THE ORIENTAL INSURANCE CO. LTD., M.G. ROAD,
COCHIN-35.

BY ADV. SRI.M.JACOB MURICKAN

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 9/2/2007, THE COURT, ON 14/02/2007, DELIVERED THE FOLLOWING:

P.R. Raman & S. Siri Jagan, JJ.

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M.F.A.No. 1405 of 2001

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Dated this, the 14th February, 2007.

J U D G M E N T

Siri Jagan, J.

Dissatisfied with the quantum of compensation awarded by the M.A.C.T., Ernakulam in O.P.(MV)No. 3134/1996, the claimant in the O.P has filed this appeal challenging the finding regarding contributory negligence on his part in causing the accident and also claiming enhanced compensation.

2. The Tribunal had found that the accident occurred on account of the negligence of the appellant himself and the 2nd respondent in the ratio of 75:25 and although it was found that the appellant was entitled to a total compensation of Rs. 41,500/-, in view of the contributory negligence on the part of the appellant, the actual compensation payable to the appellant was restricted to Rs. 10,500/-. Primarily, the appellant is challenging the finding of contributory negligence on the part of the appellant. The appellant also contests the quantum fixed as compensation as less than what is due to him as just and fair compensation. The accident occurred on 13-8-1996 at 9.30 p.m. According to the appellant, the accident occurred at the Ernakulam Park Avenue road in front of the Boat Jetty, while he was standing on the median of the road. He would submit that while he was standing on the median of the road, unless the 2nd respondent drove the bus negligently, the accident could not have occurred at all and therefore there is no question of any negligence on the part of the appellant. The appellant would rely on Ext. A1 document stated to be the true copy of the F.I.R. However, the Tribunal did not accept the same. The appellant also produced Ext. A2 photo copy of the charge sheet, which was not legible and readable from which the exact spot of the accident was not decipherable. The Tribunal found that the

doctor who examined the appellant after the accident found that there was smell of alcohol in his breath on his examination on the very same day of the accident. The appellant could not satisfy the Tribunal as to why the appellant could not produce the certified copy of the FIR and scene mahazar. The Tribunal entered a finding that when admittedly the appellant was standing on the median of the road, if the 2nd respondent was negligently driving the vehicle to hit the appellant, then, certainly the median should have been damaged, for which there is no evidence. These facts could have been ascertained only from the scene mahazar which has not been produced. As a result, the Tribunal drew an adverse inference from non-production of the scene mahazar. Coupled with the fact that the appellant had in fact consumed alcohol, although the appellant protested having consumed alcohol, the Tribunal came to the finding that there was actually contradictory negligence on the part of the appellant to the extent of 75%.

3. Learned counsel for the appellant would vehemently argue that even if it is true that the appellant had consumed alcohol, the only finding of the doctor was that there was smell of alcohol in his breath and therefore it could not have been found that the appellant was under the influence of alcohol. He would submit that when he was standing on the median, it defies logic as to how he could have been negligent. He would submit that the charge sheet itself contained sufficient materials to show the manner in which the accident took place. The Tribunal ought not to have found fault with the appellant in not producing the certified copy of the FIR and scene mahazar, is his contention. He would further submit that on a reading of the evidence would conclusively show that there was no

contributory negligence on the part of the appellant.

4. We have considered the arguments of both parties in detail.

5. We are not satisfied that this is a case where the doctrine of res ipsa loquitur can be applied. That being so, the primary onus of proving that negligence is normally on the appellant. In fact, this he could have easily done by production of the police records relating to the accident, particularly the scene mahazar which the appellant has not chosen to do. As such, the Tribunal was forced to rely on the materials otherwise available before it. Admittedly, the appellant was standing on the middle of the road, although he would submit that he was standing on the median. There is no conclusive proof of the fact that he was standing on the median. As observed by the Tribunal, if he was, in fact, standing on the median and he sustained injuries while the bus hit while he was standing on the median, certainly, there would have been evidence to show damage to the median which is conspicuously absent by non-production of the scene mahazar itself. Further, there is medical evidence to show that the appellant's breath smelled of alcohol immediately after the accident. Therefore, we cannot find any infirmity in the finding of the Tribunal that the appellant has contributed to the accident by his negligence. However, taking into account the entire facts and circumstances of the case, we are of opinion that the apportionment of negligence as 75:25 against the appellant is not quite in tune with the evidence available. Therefore, we alter the finding of the Tribunal regarding the proportion of negligence and fix the negligence on the part of the appellant and the 2nd respondent in the ratio of 50:50.

6. As we have already mentioned, the appellant also challenges the quantum of compensation. The appellant had sustained the

following injuries.

1. Lacerated wound over nasal bridge.
2. Swelling and tenderness over (R) wrist and (R) knee.
3. Fracture lower and of radius
4. Closed reduction of fracture (R) wrist and (R) knee.
5. Comminuted fracture lower end of radius with dorsal tilt (R) wrist.
6. Severe osteoarthritis (R) knee.
7. Bifrontal contusion with thin acute subdural haomatoma.
8. Liner fracture occipital bone.

Therefore, he would have suffered great pain and suffering. He had undergone several operations also. Taking into account all these circumstances, we hold that instead of Rs. 14,000/- awarded by the Ttribunal towards compensation for pain and suffering, the appellant should be given a total amount of Rs. 20,000/- as compensation under that head. We also feel that the amount awarded towards loss of amenities should be enhanced from Rs.5,000/- to Rs. 10,000/-. In respect of other heads, we do not think any enhancement from the amount computed by the Tribunal is warranted.

Accordingly, we hold that the appellant is entitled to a further sum of Rs. 11,000/- also as compensation. Consequently, the total compensation computable would be Rs. 52,500/-. Since the appellant has contributed to the accident by his negligence by 50%, the appellant would be entitled to only half of this amount. This amount would carry interest at 12% p.a. from 4-11-1996 till the date of payment minus the amount, if any, already paid. The insurance company shall pay the amount as directed by the Tribunal within one month from the date of receipt of a copy of this judgment. The appeal is disposed of as above. But, we do not make any order as to costs in

this appeal although the appellant would be entitled to proportionate costs in the O.P(MV) as directed by the Tribunal.

Sd/- P.R. Raman, Judge.

Sd/- S. Siri Jagan, Judge.

Tds/

[True copy]

P.S to Judge.

P.R. Raman & S. Siri Jagan, JJ.

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J U D G M E N T

14th February, 2007.